Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

WANDERLON ANN BARNES,

Petitioner,

v.

ARTHUR LEVITT, JR., in his official capacity as Chairman of the United States Securities & Exchange Commission,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should the due process available to persons who flagrantly abuse the judicial process be afforded, at a minimum, to individuals who simply fail, for whatever reasons, to exhaust fully administrative remedies in a Title VII case?

When the same federal agency that is the target of allegations of illegal discrimination concludes that the plaintiff has failed to cooperate sufficiently with the agency's administrative investigation of the underlying charge, how much deference should the federal courts afford that agency decision?

LIST OF ALL PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here are those who appear in the caption of the case. There is no parent or subsidiary of any party listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wanderlon Ann Barnes, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 118 F.3d 404 (5th Cir. 1997) and is reproduced in the Appendix filed herewith ("App.") at App. 1. The opinion of the district court is reported as *Barnes v. Breeden*, 911 F. Supp. 1038 (S.D. Tx. 1996); it is reproduced in the Appendix filed herewith at App. 13. The Court of Appeals' denial of petitioner's petition for rehearing is unreported; it is reproduced in the Appendix filed herewith at App. 43.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was rendered on July 31, 1997. The order denying the petitioner's request for a rehearing was issued on November 19, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1972) (amended 1991) (Title VII), is set forth below:

§ 2000e-16(c) Employment by Federal Government –

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

STATEMENT OF THE CASE

The Plaintiff, Wanderlon Barnes, is an African-American female who worked in the Houston Branch office of the Securities and Exchange Commission ("SEC"). Barnes is an attorney, as were the majority of the decision-makers and witnesses in the case. After a bench trial of sixteen days, the district court ruled that the SEC had engaged in intentional discrimination against Barnes. The court found that Barnes' supervisor – Joseph C. Matta, a Hispanic male – had engaged in a pattern and practice of discrimination against Barnes based on both her race and gender. 911 F. Supp. at 1050. The conduct began with his decision to hire a much less experienced Hispanic male attorney – Adrian R. Martinez, who had never tried a major case, civil or criminal.

Matta assigned the better cases to Martinez and helped Martinez work them up. Matta invited Martinez's participation when he was reviewing Barnes' performance, but Barnes did not receive the same privilege. *Id.* at 1049. Matta then promoted Martinez over Barnes to a grade GS14, a grade that Barnes had been told was not available. In the words of the district court, "Matta was prepared to and performed every trick to undermine Barnes, who was on track to be considered for any position ahead of Martinez." *Id.* at 1050.

The district court also found that Matta's conduct, as well as that of his male supervisors in another SEC office, created an environment where the female employees either submitted to sexual overtures or were treated

poorly as a result of their refusal. *Id.* at 1048. The pervasive nature of Matta's sexually inappropriate conduct was established by several witnesses. His malicious conduct created and perpetrated a hostile work environment.

The SEC's appeal asserted that Barnes had failed to exhaust her administrative remedies and that her complaint should therefore be dismissed for lack of jurisdiction. The record reveals that Barnes' complaints were first investigated by the agency during the summer of 1991, when 19 other people were interviewed, and Barnes herself spoke with the investigator 45 times to provide more details. That investigation, the parties agree, focused on complaints of racism. When the complaint proceeded to the next step, Barnes retained counsel and raised the issue of sexual harassment. During the following months, the agency took the depositions of 30 people pertaining to the allegations of sexual harassment. Counsel had several disagreements during that time over the terms under which Barnes could obtain a copy of the report written by the first investigator and whether Barnes would give a more detailed statement to the agency. Ultimately, Barnes did not give a statement to the SEC expanding on the allegations of sexual harassment. When she did not appear for a deposition on February 5, 1992, the agency cancelled the complaints of both race discrimination and sexual harassment for failure to exhaust administrative remedies.

At trial, however, the evidence revealed that the lack of petitioner's statement did not really hinder its investigation. The SEC's associate general counsel, in fact, could not articulate any area in which the agency did not have sufficient information without Barnes' testimony.

Another SEC official testified that the agency was lacking some information about Barnes' allegations of sexual harassment because of her refusal to provide a statement, but conceded that the agency had sufficient evidence on the claim of race discrimination.

ARGUMENT

I. The Need for Direction on Due Process Considerations When a Complaint is Dismissed for Failure to Exhaust Administrative Remedies.

This case presents the question of what due process considerations should guide the lower courts when deciding whether to dismiss a federal employee's discrimination case *in toto* as punishment for being less than forthcoming during her employer's investigation of that complaint. The applicable statute – Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* – requires only that the aggrieved employee present her claim first to the federal agency that employs her. This allows the employer, an agency of the federal government, to investigate itself and, perhaps, to conciliate the compliant, thus saving judicial resources. When the federal employee fails, through either negligence or intransigence, to cooperate in that investigative process, what penalty, if any, should be assessed by the lower courts?

A. Considerations of Due Process in Other Contexts – Does the Punishment Fit the Crime?

This Court, when reviewing decisions to dismiss a case in its entirety regardless of the merits, has frequently held that such dismissals should be read in light of the provisions of the Fifth Amendment, which provides that no person shall be deprived of property without due process of law. *See, e.g., Societe Int'l v. Rogers*, 357 U.S. 197, 209-210 (1958). Due process considerations arise from the observation that

> there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.

357 U.S. at 209.

This Court has not yet examined the question of what due process considerations apply when a court in equity considers whether a party sufficiently cooperated in a pre-litigation investigation. In *Societe*, the district court dismissed the action altogether when the plaintiff could not produce certain records as the court had ordered because they had been seized by the Swiss government and the party could be criminally prosecuted should it violate its government's laws. *Id.* at 201. After the Court of Appeals affirmed the district court's dismissal of the action for that party's noncompliance, this Court reversed, holding:

> Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

Id. at 212. The Court held that, upon remand, the district court should consider a number of alternatives that were less harsh in their result – making the punishment fit the crime, so to speak. It recognized that, should there be a trial on the merits, the petitioner's inability to produce specific information would prove a serious handicap for it, and, in the absence of those records, the district court "would be justified in drawing inferences unfavorable to petitioner as to particular events." *Id.* at 213. Nonetheless, the conduct did not warrant a total dismissal of the petitioner's case.

In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauzites de Guinee*, 456 U.S. 694, 705-06 (1982), this Court addressed a related question: can a lower court deem that it has personal jurisdiction over a party as a sanction for that party's failure to provide discovery on the personal jurisdiction question? The Court's analysis of the facts presented in that case again focused on whether the sanction imposed was just and whether it was specifically tailored to the harm caused by the recalcitrant party. In that particular instance, this Court found that the district court had properly weighed the facts and the alternatives and that it had engaged in no abuse of discretion by declaring personal jurisdiction over that party. The sanction was directly related to the misconduct.

The idea that the punishment should fit the crime "is deeply rooted and frequently repeated in common-law jurisprudence." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, ___ n.24, 116 S. Ct. 1589, 1599 n.24 (1996) (*quoting Solem v. Helm*, 463 U.S. 277, 284 (1983)). Due process considerations are what led this Court, in that recent decision, to decide that the company's failure to tell the auto purchaser that portions of his car had been repainted was not so reprehensible as to warrant the imposition of $2 million in punitive damages. Citing a decision rendered 150 years previously, this Court noted that an award of exemplary damages to punish the wrongdoer simply must reflect "the enormity of his offense." 517 U.S. at ___, 116 S. Ct. at 1599 (*quoting Day v. Woodworth*, 54 U.S. 363 (1852)). Stated in even simpler terms, "some wrongs are more blameworthy than others." *Id.*

B. Considerations of Due Process in Title VII Cases – Should a Party's Procedural Error Cause the Baby to be Thrown Out with the Bath Water?

In each instance when the question has been presented, this Court has looked to the intent of Title VII when deciding whether a plaintiff's misstep should deprive the individual of all recovery. On each occasion, this Court has refused to require stringent adherence to all statutory and regulatory requirements that could prevent an employee from pursuing a claim of discrimination in the district courts.

In *Love v. Pullman*, 404 U.S. 522 (1972), for example, the lower court dismissed the individual's complaint, holding that the statutory prerequisites to the maintenance of the suit had not been met because he filed his complaint of discrimination first with the EEOC rather than with the state agency, as required by statute. *Id.* at 523. When the employee filed his charge with the EEOC, it forwarded the charge to the state agency for processing, holding its own action in abeyance until after the state agency had waived its authority to investigate the matter. The employer argued that allowing the EEOC to hold an unripe charge in "suspended animation," as it did, was not contemplated or permitted by the statute. *Id.* at 525. This Court accepted certiorari to decide whether the complainant's technical misstep – filing with the wrong agency – was sufficient grounds to dismiss the case altogether. After concluding that the punishment did not fit the crime, it reversed the judgment of the lower courts, observing that a resort to technicalities that forecloses recourse to the judicial processes is "particularly inappropriate." *Id.* at 527.

The considerations of due process are similarly present in this Court's more recent decision in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). There, the lower court dismissed the case because, during discovery, the defendant learned that the plaintiff had taken home highly confidential documents belonging to the company – a terminable offense. The employer argued, and the lower courts agreed, that McKennon's misconduct was grounds for dismissing her lawsuit. This Court granted certiorari to answer the question of whether all relief must be denied when, although an employee has

been discharged in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, the employer later discovers some wrongful conduct that would have led to discharge if it had been discovered earlier. The starting point for this Court's analysis was the recognition that the ADEA is "part of an ongoing congressional effort to eradicate discrimination in the workplace [that] reflects a societal condemnation of invidious bias in employment decisions." 513 U.S. at 357.

Following that statement, this Court noted that the remedial measures of the ADEA, like Title VII, were enacted so as to "serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." *Id.* at 358 (*quoting Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975)). The Court then held that punishing the plaintiff's misconduct with the severest of sanctions – dismissal – served neither the deterrence nor the compensation objective of the ADEA. Accordingly, because of the important national policies served by the ADEA, it ruled that the clean hands doctrine should not operate to automatically bar a plaintiff from invoking the aid of the courts to resolve matters of discrimination. *Id.* at 360. But, recognizing the employer's legitimate interests as well, it also held that the employee's misconduct should be taken into account when fashioning a remedy. *Id.* at 361.

Congress, as well, expressed its concerns for due process when it amended Title VII in 1972 to extend its coverage to federal employees. During legislative debate over the bill, Congress repeatedly criticized how the federal agencies and courts were formalistically applying the

doctrine of exhaustion of remedies to federal employees, noting that it had "become [a] barrier to meaningful court review." H.R. Rep. No. 92-238, 92nd Cong., 1st Sess., 22-26 (1971).

This case presents the Court with an opportunity to provide guidance to the lower courts when they consider the ultimate implications of applying the exhaustion doctrine and dismissing suits against federal agencies, thereby depriving the aggrieved individual of any remedy for unlawful discrimination.

II. Considerations of an Agency's Determination on Exhaustion – Is it Entitled to Absolute Deference?

In *Chandler v. Roudebush*, 425 U.S. 840 (1976), this Court held that federal employees enjoy the same right to a trial de novo of Title VII claims as private-sector employees. The Court specifically rejected the argument that federal courts should defer to agency findings with respect to the merits of employees' claims. *Id.* at 864. Because the agency in that case had reached a decision on the merits, however, the Court's opinion is silent as to the proper scope and focus of the district court's inquiry when, as in this case, the agency, instead of reaching the merits of the claim, cancels the complaint for a failure to exhaust administrative remedies. This case presents the Court with an opportunity to provide guidance to the lower courts on a question not addressed in *Chandler:* what standard of review should the courts apply when the agency claims that the individual did not adequately exhaust her administrative remedies?

With the ruling below, the Fifth Circuit gives great deference to an agency finding that the victim did not properly exhaust her administrative remedies. This decision brings the Fifth Circuit into conflict with the positions taken by the U.S. Courts of Appeals for the Eleventh and District of Columbia Circuits, which look to the entire record to ascertain the actual effect of the complainant's lack of cooperation. *Wilson v. Peña*, 79 F.3d 154 (D.C. Cir. 1996); *Wade v. Secretary of the Army*, 796 F.2d 1369 (11th Cir. 1986); *Mangiapane v. Adams*, 661 F.2d 1388 (D.C. Cir. 1981).

The Fifth Circuit's decision permits a federal agency to make the final determination of whether a person has properly cooperated with the agency's own investigation. This standard runs the risk of encouraging federal agencies to always reach the conclusion that the complaining employee did not sufficiently cooperate and thus failed to exhaust her administrative remedies. This, of course, allows the agency to later avoid all liability for its own unlawful conduct. Aside from creating a temptation for the less scrupulous, this standard does not require a showing that the individual's conduct actually caused harm in some way to the agency. Thus, the standard operates to deprive victims of their rightful remedies regardless of whether their conduct caused any harm or was merely an example of bad manners.

At least two other circuits have rejected this unquestioning deference to a governmental agency. Rather than adopting the agency's argument that the plaintiff, an unsuccessful job applicant, had failed to exhaust his administrative remedies, the U.S. Court of Appeals for the District of Columbia Circuit instead examined

whether the person's lapse had caused any harm to the agency. In *Wilson*, the agency argued that the job applicant had not exhausted his administrative remedies because he had failed to comply with an EEOC directive to provide the agency with "a notarized affidavit, signed under penalties of perjury, indicating all gross income he earned for each of the years covered by the backpay award." 79 F.3d at 159. While the district court deferred to the agency's finding, the Court of Appeals refused to do likewise and instead sought to ascertain whether the employee's failure to provide that statement adversely impacted the agency's efforts:

> [E]ven if the plaintiff fails to make a good-faith attempt to comply with reasonable agency requests for information, the policy underlying the doctrine is not served unless the default prevents the agency from acting on the merits of the complaint.

Id. at 165. The Court of Appeals pointed out that, despite the failure to cooperate, the agency had been able to calculate backpay and, indeed, had sent a check to Mr. Wilson. The court therefore concluded that the exhaustion requirement should not be invoked because it served no practical purpose. *Id.*

A federal employee certainly has the duty to provide the agency with "the information **necessary** to evaluate the merits of his or her complaint." *Wade v. Secretary of the Army*, 796 F.2d 1369, 1376 (11th Cir. 1986) (emphasis added). But only if there is a showing that the agency could not proceed without the requested information can the agency have suffered any harm. Should the employee's conduct not cause any harm to the agency, the

Eleventh Circuit holds, there is no justification for penalizing the employee. Just as the harmless error doctrine requires a party to show, not merely a technical error, but demonstrable harm as well, so should the exhaustion requirement be required to serve a purpose more substantial than the discriminating agency's interest in avoiding liability for its misconduct.

The exhaustion requirement was never intended by Congress to become "a massive procedural roadblock to access to courts." *President v. Vance*, 627 F.2d 353, 362 (D.C. Cir. 1980). The policy behind the requirement that federal employees exhaust administrative remedies prior to filing a lawsuit is based on two considerations: (1) it protects agency authority by giving it the opportunity to correct its mistakes; and (2) it promotes judicial efficiency. *McCarthy v. Larry Madigan*, 503 U.S. 140, 145 (1992); *Brown v. Marsh*, 777 F.2d 8, 14 (D.C. Cir. 1985).

Neither policy consideration behind the exhaustion doctrine is served by the Fifth Circuit's decision to absolve the SEC of all liability for intentional discrimination on a hypertechnical ground. As the district court concluded, the SEC had adequate opportunity to remedy the discriminatory treatment of Barnes in its Houston office. There were a total of three independent investigations conducted as a result of her complaints and, by December 1991, the agency publicly announced its conclusion that there was no wrongdoing in the Houston office. Thus, Barnes' failure to provide her statement on February 5, 1992 – the day sought by the SEC – did not adversely impact either the investigative or judicial process.

This case thus presents this Court with an opportunity to resolve the conflict between the circuits. Should the courts independently assess whether and, if so, the extent of any harm to an agency whose employee does not fully cooperate, as two circuits have done? Or, as the Fifth Circuit has done, should the courts defer their judgment as to whether a federal employee has sufficiently exhausted her administrative remedies to the decision of the federal agency?

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

No. 96-20597

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

118 F.3d 404; 1997 U.S. App. LEXIS 19806;
71 Empl. Prac. Dec. (CCH) P44,942

Wanderlon Ann BARNES, Plaintiff-Appellee, v. Arthur J. LEVITT, Jr., in his official capacity as Chairman of the United States Securities & Exchange Commission, et al., Defendants.

July 31, 1997

Appeal from the United States District Court for the Southern District of Texas.

JUDGES: Before DAVIS, STEWART and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Appellant, Arthur J. Levitt, Jr., in his official capacity as Chairman of the United States Securities and Exchange Commission ("the Chairman") appeals the judgment for Appellee Wanderlon Ann Barnes ("Barnes") on her employment discrimination claims. Finding that the district court lacked jurisdiction over her claims, we reverse.

FACTS AND PROCEEDINGS BELOW

Barnes is an African-American female who was employed as a staff attorney in the Houston Branch Office of the Securities and Exchange Commission ("SEC") from August 28, 1988 until September 6, 1991. Joseph C. Matta,

an Hispanic male, served as the Branch Chief of the Houston Branch Office from April 1986, until October 1987, when he was promoted to Assistant Regional Administrator in the same office. When he became Assistant Regional Administrator, Joy Boddie, an African-American female, replaced him as Branch Chief until she was transferred to the Chicago office. Nancy McGinley, a Caucasian female, succeeded Boddie as Branch Chief and remained in that position throughout the remainder of Barnes's employment. Boddie, and later McGinley, served as Barnes's immediate supervisors and their immediate supervisor was Matta.

During her first year, Barnes had a good relationship with both Boddie and Matta and received "outstanding," the highest possible rating on her annual performance evaluation. In September 1989, Barnes's supervisors strongly urged her to attend a training conference in Austin, Texas along with the other attorneys in the Houston Branch office. She refused, telling her supervisors that she would not be going for personal reasons. In court she testified that the real reason she refused to attend was that she did not like to fly and that she thought that she would have to ride to the conference with Matta. She did not want to ride with Matta because she had heard rumors that he had sexually harassed someone in the past and she did not like his tendency to "talk on and on and on and on and repeat himself over and over again." Matta never asked Barnes to travel to the conference with him nor did he know the reason for her refusal. Barnes testified that after the conference her relationship with Boddie and Matta soured and they

began to criticize her work in ways that she thought were unfair.

In late 1989, about the same time Barnes begin to have trouble with her supervisors, Adrian Martinez was hired as a staff attorney in the Houston Branch Office. Martinez, like Matta, was an Hispanic male. His starting salary was higher than Barnes's starting salary, but the same as her current pay rate. In February of 1991, Martinez received a pay raise and was then making more money than Barnes. When Barnes learned about Martinez's pay raise, she sought counseling with the SEC's Office of Equal Opportunity ("EEO") complaining of disparate treatment by Matta on the basis of race with respect to work assignments, promotions, time and attendance, working conditions, and support staff assistance. Susann Reilly, the EEO counselor who was assigned to handle the informal complaint, interviewed Barnes on numerous occasions, interviewed twenty individuals identified as witnesses to the events forming the basis of the claims and prepared a Counseling Report. After approximately four months of investigation, Reilly contacted Matta's supervisor to explore settlement options. However, because Barnes's demands could not be acted upon within the one-week time frame Barnes stipulated, Reilly finalized the EEO counseling report and sent Barnes a notification of her right to file a formal administrative EEO complaint.

On August 23, 1991, Barnes's attorney, Beville May ("May"), sent the SEC a formal EEO complaint and on September 3, 1991 submitted an amended formal EEO complaint. Barnes did not sign either complaint as required by the EEOC regulations then in effect. *See* 29

C.F.R. 1613.214(a)(1). The amended EEO complaint alleged, *inter alia*, that from autumn of 1989 until September 1991 (1) Matta subjected Barnes to a campaign of racially and sexually motivated harassment; (2) Matta subjected Barnes to disparate treatment and work sabotage; (3) Matta retaliated against Barnes after she filed her informal EEO complaint; (4) Matta sexually propositioned Barnes and others at the Houston office; (5) "other senior officials," including former regional administrator Edwin Tomko, created a hostile and offensive environment, and that their conduct included rape, sexual assault, sexually suggestive mannerisms, leering, dirty and racist jokes; and (6) Barnes's mail was tampered with, her telephone calls monitored, and her life threatened after filing her EEO complaint. In response to the complaints, the SEC began an investigation (eventually interviewing approximately thirty people) and immediately placed Matta on indefinite leave status.

On Monday, September 9, 1991 Barnes started a job as an attorney at the Resolution Trust Corporation ("RTC") earning the same salary she was then making at the SEC. On that date, she told the SEC that it should consider her constructively discharged as of September 6, 1991.

The SEC requested that Barnes provide information, such as the names of the SEC officials who had allegedly engaged in the misconduct, the specific conduct engaged in, the identities of the alleged victims and when the alleged conduct occurred. On September 10, 1991, Barnes's attorney, Beville May responded to the requests in writing, stating:

> It is correct that I have declined to provide detailed information supporting the allegations in Ms. Barnes' Formal Complaint of Discrimination to the Commission. The reason for this refusal, however, was because the SEC has had the information for years and refused to conduct a meaningful investigation and/or do anything to stop it.

May repeatedly declined to cooperate with the SEC investigation, remarking that "you will get it in discovery" and rather than "provide any specifics" she "intended to file a complaint in court."[1] While declining to discuss the complaint with the SEC, May granted an interview to a newspaper reporter with the *Houston Chronicle*. A front page article quoted May as stating that an EEOC "complaint filed August 27 claims Matta sexually assaulted a female employee" and "that Matta overlooked rapes by other men in the six-person office," when, in fact, the complaint did not make those allegations against Matta. *See Matta v. May*, 118 F.3d 410 (5th Cir.1997) (discussing the defamation claim against May arising out of the newspaper article).

Despite the lack of cooperation from Barnes, the SEC appointed special EEO investigators who interviewed

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[1] During the administrative complaint stage, attorney May made repeated references to *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C.1988), where May had successfully represented a plaintiff who brought sexual harassment claims against the SEC. One of May's letters to the EEOC investigator took issue with a letter sent to Barnes and advised the investigator, "You might just find yourself Absent Without Job. Your predecessor is named in the *Broderick* decision as a result of tangling with me. I wouldn't seek out that kind of notoriety if I were you."

approximately thirty past and present SEC employees. Several additional former employees declined to be interviewed.

By letter to attorney May, the SEC informed Barnes that she had an obligation under the applicable regulations (29 C.F.R. 1613.216(b)(2)) to cooperate with the investigation, by providing sworn testimony and documentation concerning her complaint and that the failure to do so could cause cancellation of her complaint. May responded that Barnes would give a deposition only if the SEC provided her a copy of Reilly's EEO report. The agency agreed to release the report, but needed May to sign a routine confidentiality agreement, agreeing not to disclose any nonpublic information about ongoing SEC securities fraud cases. May never executed the agreement or attempted to amend the agreement, despite repeated efforts by the SEC to accommodate any concern she might have.

On January 29, 1992, the SEC sent Barnes a letter stating that if she maintained her lack of cooperation, the agency would cancel her complaint. Barnes then agreed to provide a deposition, which was scheduled for February 5, 1992. On February 4, May informed the SEC that Barnes would not attend the deposition because she had surgery scheduled for the next week, but made no attempt to reschedule the deposition or to claim that Barnes's health prevented her participation in the scheduled deposition. The SEC asked May to agree to extend the 180-day period for filing suit, which would have expired on February 23, 1992, but she refused.

On February 20, 1992, the SEC sent Barnes a letter canceling her complaint for her failure to cooperate. The letter detailed Barnes's allegations, the agency's investigation, and the need for more information from Barnes. On March 23, 1992, Barnes filed this civil action under Title VII, 42 U.S.C. § 2000e and the Equal Pay Act, 29 U.S.C. § 203. After bench trial, the district court found that the SEC had essentially completed its investigation, except that it wanted Barnes's deposition, holding that the "fact that the SEC wanted to close its investigation with Barnes's deposition and was unable to get the deposition within the SEC's time frame is no reflection on Barnes's cooperation." The district court held that Barnes acted in good faith and made reasonable efforts to provide the necessary information to the SEC. On the merits, the district court concluded that Matta's conduct "represented a pattern and practice of discrimination against plaintiff based on both her gender and race." The district court awarded Barnes $275,426 in back pay under Title VII, $53,983.50 for "lost fringe benefits" under Title VII, $210,468 as liquidated damages under the Equal Pay Act, $283,856 in attorneys' fees and adopted the injunction order entered in *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C.1988).[2]

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[2] In *Broderick*, the district court for the District of Columbia entered a consent order in a sexual harassment case arising out of a SEC field office in Virginia. The order included an injunction against sexual harassment of SEC employees.

JURISDICTIONAL PREREQUISITES FOR TITLE VII ACTION

The filing of an administrative complaint is a jurisdictional prerequisite to a Title VII action. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir.1995). Further, a complainant must pursue and exhaust his administrative remedies prior to filing a judicial complaint. *Johnson v. Bergland*, 614 F.2d 415, 417 (5th Cir.1980). If the agency does not reach the merits of the complaint because the complainant fails to comply with the administrative procedures the Court should not reach the merits either. *Id.* at 418.

As a threshold matter in the trial court, the Secretary contended that the court lacked jurisdiction over Barnes's claims. The district court held that Barnes sufficiently exhausted the administrative procedures available to her, finding that Barnes acted in good faith and made reasonable efforts to provide the necessary relevant information to the SEC.

On appeal, the Secretary argues that the district court erred in finding that Barnes acted in good faith and with reasonable effort. He alleges that the record establishes that Barnes failed to cooperate with the administrative procedures and the district court therefore lacked jurisdiction over her Title VII claims. We agree.

Title VII describes the procedure for bringing a civil action alleging discrimination:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit . . . or after one hundred and eighty days from

> the filing of the initial charge with the department, agency or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title. . . .

42 U.S.C. § 2000e-16(c) (1989).

The 180-day provision essentially allows the claimant to appeal to the district court if there has not been final agency action on her claim after six months from filing the claim with the agency. *Munoz v. Aldridge*, 894 F.2d 1489, 1492 (5th Cir.1990). There is no dispute that more than 180 days passed between the time Barnes filed her formal complaint and the time she filed her Title VII action in district court. However, it is well established that, notwithstanding the passage of 180 days, plaintiffs who resort to the administrative process but do not cooperate in the proceedings can thereby fail to exhaust their administrative remedies. *Johnson v. Bergland*, 614 F.2d 415, 418 (5th Cir.1980) (finding no federal court jurisdiction where plaintiff's administrative complaint "described general situations that could have occurred at any time; . . . [and] did not set out any specific incidents or dates of discrimination"). The purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer. "The test for cooperation in the administrative process is a common sense one, geared to the functional

demands of dispute resolution." *Id.* at 1493. Good faith effort by the employee to cooperate with the agency and the EEOC and to provide all relevant, available information is all that is required to demonstrate an exhaustion of administrative remedies. *Id.* After reviewing the record, we conclude that Barnes did not act in good faith or make reasonable efforts to provide the necessary relevant information to the SEC after filing her formal complaint. She repeatedly refused to answer questions, provide details, make a statement, give a deposition or even sign her complaint. Even after extensive investigation, the EEOC [sic] did not have the information it needed to pursue and resolve Barnes's dispute with the SEC. It is clear that as to her gender and sexual harassment claims, which were only marginally referenced in the informal process, she wholly failed to exhaust her administrative remedies.

The factual bases of Barnes's claims of racial discrimination were better developed during the informal phase of the administrative process than were her sexual harassment and gender discrimination claims. This case presents the question whether a plaintiff who cooperates during the investigation of her informal complaint but refuses to cooperate after filing a formal complaint may rely on her earlier cooperation as the basis of exhaustion. The answer in this case is that she may not. While we recognize that a plaintiff need not participate in a futile exercise, *see Jordan v. United States*, 522 F.2d 1128 (8th Cir.1975), the record does not support the conclusion that the EEOC's [sic] formal complaint process would have proven futile if Barnes had participated in good faith. During the informal complaint stage, Barnes took the position that Matta did not treat her fairly because of her

race. Even after the EEO investigator raised questions about the possibility of gender discrimination and sexual harassment, Barnes failed to attribute her problems with Matta to such discrimination during the informal process. However, in the formal complaint, sexual harassment and gender discrimination figured prominently in Barnes's explanation for her alleged suffering of disparate treatment illustrating the inconsistencies between her formal and informal complaints. Cooperation in an earlier informal process is not sufficient to satisfy the obligation to exhaust administrative remedies by cooperating in a subsequent formal investigation. Further, the record indicates that the EEOC [sic] took both Matta's [sic] formal and informal complaint seriously, devoting extensive time and resources to investigating the claims, as well as suspending Matta until the allegations could be resolved. Had Barnes complied with the SEC's requests for cooperation, the agency could have ruled on the merits of her complaint. Due to Barnes's refusal, it was unable to do so and canceled the complaint. The law affords the agency discretion to cancel a formal complaint on the ground that the complainant has failed, after due opportunity, to supply the agency with the information sufficiently specific to enable it to conduct a meaningful investigation. *Johnson v. Bergland*, 614 F.2d 415, 418 (5th Cir.1980). We find that the agency did not abuse its discretion in canceling the complaint in this case. Further, a complainant may not be dilatory at the administrative level, wait for the 180 days to pass, and then invoke the jurisdiction of the federal court. *See Id.* Because Barnes refused to cooperate, thereby failing to exhaust her administrative

remedies, the district court lacked jurisdiction to adjudicate her Title VII claims. *See Id.*

JURISDICTION OF THE EQUAL PAY ACT CLAIM

The district court also lacked jurisdiction over Barnes's claims asserted against the United States under the Equal Pay Act. Under the Tucker Act, 28 U.S.C. § 1491, a plaintiff asserting an Equal Pay Act cause of action must bring that action in the Court of Federal Claims if the claim, including the fees sought, exceeds $10,000. Because Barnes's claim greatly exceeded the jurisdictional limit, the district court lacked jurisdiction to adjudicate the claim. *See Wilkerson v. United States*, 67 F.3d 112 (5th Cir.1995). Although this issue was not raised below, a jurisdictional matter cannot be waived and can be raised at any time. *See Graham v. Henegar*, 640 F.2d 732, 734 n.4 (5th Cir.1981).

CONCLUSION

Because the district court lacked jurisdiction to hear Barnes's claims, we reverse the judgment for Barnes, positing no opinion on the merits of those claims.

REVERSED.

APPENDIX B

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WANDERLON ANN BARNES, Plaintiff, VS. RICHARD C. BREEDEN, ET AL., Defendants.	)	CIVIL ACTION NO. H-92-0898 (Filed Jan. 29, 1996)

AMENDED MEMORANDUM OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a civil rights case brought by Wanderlon Ann Barnes, the plaintiff. She asserts violations of Title VII of the Civil Rights Act, Title 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act, Title 29 U.S.C. § 206(d)(1). Specifically, she claims that she was treated differently in the terms and conditions of employment, not fairly considered in her work assignments, subjected to sexual harassment and gender bias, and in spite of qualifications, not given a promotion that she qualified to receive. Finally, she claims that she was not paid an equal wage for equal work.

This Court has jurisdiction over the plaintiff's claims pursuant to Title VII of the Civil Rights Act and the Equal

Pay Act. After a trial to the Court, the following findings of fact are chronicled:

The Parties and Key Actors:

The plaintiff is a African-American female attorney, who was employed in the Houston Branch Office ("HBO") of the Securities and Exchange Commission ("SEC") from on or about August 28, 1988, until September 6, 1991, when she left the employment of the SEC and began employment with the Resolution Trust Corporation on or about September 9, 1991.

The SEC is a governmental agency charged with, among other things, the regulation and enforcement of the federal securities laws. It's mission was accomplished through several field offices, including the Fort Worth District Office, formerly the Fort Worth Regional Office, ("FWRO"). The HBO was a branch office of the FWRO until approximately December 30, 1991, when it was officially reclaimed by the FWRO.

During the relevant time to the claims and defenses raised in this proceeding, T. Christopher Browne, a Caucasian male, was the Regional Administrator of the FWRO of the SEC.

Joseph C. Matta, an Hispanic male, served as the Branch Chief of the HBO from April of 1986, until October of 1987, when he was appointed the Assistant Regional Administrator serving at the HBO. He remained in that capacity until the HBO was officially merged into the FWRO. When he became Assistant Regional Administrator, Joy Boddie, an African-American female, became

the Branch Chief of the HBO and remained in that capacity until August of 1990, when she transferred to the Chicago office. Nancy McGinley, a Caucasian female, succeeded Joy Boddie as Branch Chief of the HBO and maintained that status throughout the remainder of the plaintiff's employment which ended in September of 1991. Both Boddie and McGinley served as the plaintiff's immediate supervisor during their tenure and their immediate supervisor was Matta.

Barnes' First Year:

In August of 1988, the plaintiff interviewed with Joseph C. Matta and Joy M. Boddie for a staff attorney's position with the SEC. Barnes was employed at salary grade of GS13, Step 1 in August, shortly after the interview. Although Barnes sought a higher salary, she would not obtain it.[1] Instead, she was assured that at every opportunity she would be considered for promotion or increase. Barnes received step advances during her tenure: a GS13-3 in 1990 and a GS13-4 in 1991.

After commencing employment, Barnes was assigned at least one "case" and several "matters under investigation" ("MUI"). Barnes learned early on that to advance, a staff attorney must handle cases and MUI's that were

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[1] Under guidelines applicable to the hiring process (Defendant's Exh. #121) the plaintiff could have been hired at a salary 20% above that for which she was employed. In fact, the plaintiff could have been hired as at pay grade GS13, Step 3 under the applicable guidelines because her salary and benefits with the state of Texas exceeded $35,000.00 at the time that she acceptable [sic] employment with the SEC.

high profile, if possible, and that statistics were gathered based on specific action taken by the staff attorney on a particular file.

In fact, the SEC office operated somewhat on a competitive basis. To be well thought of and to receive advances, promotions and bonuses the staff attorney should receive and successfully complete a case and numerous MUI's. Oftentimes, the high profile cases assured advancement and were, therefore, coveted. For every action taken on a file, the attorney received from a one-half (1/2) to one (1) full statistical point. Thus, the progress of the case could be tracked, as well.

One of the cases assigned to Barnes, that became focused in this dispute, was *In the Matter of John N. Ehrman* case.[2] When Barnes received the Ehrman assignment, she was to proceed with an investigation and determine what action, if any, should be taken. At this point in time, 1988, the Ehrman entities were involved in various fraudulent schemes and the schemes were ongoing. These revelations were made for the first time in July of 1989 in Barnes' initial draft of the Action Memorandum. Although the case had been around the office for some time and had been handled by Boddie and others, none had performed an adequate investigation. As a result of this Memorandum, Barnes received the highest possible

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[2] Originally, the case was assigned as the Transwestern case. Through her investigation, Barnes discovered that Ehrman was the mastermind of the Transwestern scheme and several others. It was then, 1989, that the focus turned to Ehrman, who was a "crook" in deed.

rating, "Outstanding," on her annual performance evaluation. Both Boddie and Matta received and reviewed the Memorandum and expressed the view that it was excellent.

Up to this point, neither Boddie nor Matta had done anything unusual in supervising Barnes' work product. In fact, both Boddie and Matta stated during trial that because Barnes had trial and courtroom experience, they assumed that she was well equipped to handle herself and that if she needed help they expected her to consult with them. It should be noted that neither Matta nor Boddie had the amount of trial or courtroom experience as Barnes.

During this first year, and to October of 1989, Barnes, Matta and Boddie has a friendly relationship. Although general comments about Barnes' appearance and her ancestral mix (texture of hair and color of skin) had been made by Matta, these comments were not focused or insulting. Barnes testified that the relationship between and among them changed when Barnes failed to attend the Bandera Conference held in Austin, in September of 1989. According to Barnes, an administrative officer, as opposed to a fellow attorney, was sent to ask her about attending the conference. When that officer was unable to persuade Barnes that it was important that she attend, both Boddie and Matta came separately, each making inquiry and demanding to know why Barnes would not attend the conference. It is noteworthy that Matta had not made arrangements to travel with another member of the staff and desired that Barnes either ride with him or she with him. After this exchange, and when Barnes failed to

attend, Matta and Brodie changed their attitude and conduct toward Barnes.

After the Bandera Conference:

Shortly after returning from the Bandera Conference, Boddie wrote a short memorandum to Barnes describing certain stylistic and substantive changes that should be incorporated in Barnes' Memorandum. Later, meetings were convened and during those meetings both Boddie and Matta, for the first time, engaged in serious criticism of Barnes' work and of her personally to the point of yelling at her. Comments such as "a smart attorney would have done this" and "even a first year attorney would have done this" were frequent statements.

The meetings often started around noon and would continue until the staff had left late in the evening. (It is noted that during this time it was known to Matta that Boddie was actively pursuing a transfer to the Chicago office and that her spot would be vacant.) The three met, in various combinations, almost daily through December of 1989. During the three month period and until May of 1990, the Memorandum was revised scores of times, mainly by Matta.

Boddie and Matta pointed out to Barnes how inadequately she was prepared to discuss the Ehrman case with them. They accused her of preparing improper discovery requests to Ehrman, although they had previously read and approved the drafts. Boddie and Matta disapproved of Barnes' return of Ehrman's document to Ehrman, although Boddie was anxious to get the records out

of the office library. According to Boddie, the many boxes of business records were "cluttering" up the office.

Request for the issuance of subpoenas for bank records associated with Ehrman were denied when requested by Barnes. Later, Barnes was criticized for not having the very information that she had earlier sought through the subpoenas.

It was also during the month of October of 1989 that Adrian R. Martinez and Matta discussed Martinez's employment with the SEC. On or about November 15, 1989, Adrian R. Martinez was employed by the SEC. He was employed at pay grade GS13-3 based solely on his (Martinez) representation that he was earning $48,000.00 in his "solo" law practice. Because Martinez was practicing alone and had done so for only a few months, there was no documentation to substantiate his claim. His employment previous to his solo practice did not support his salary claim.

Martinez was assigned the ALIC insurance fraud case that involved claims of insurance and fraud by residents of the state of Louisiana.[3] Matta moved the ALIC case ahead of the Ehrman case. This action caused further delay in the completion of the Ehrman case.

An application for a temporary restraining order ("TRO") was filed in the ALIC case around March of

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[3] This case originally in the Fort Worth Regional Office ("FWRO") but was assigned to the Houston Branch Office ("HBO") by Christopher Browne the Regional Administrator. Browne testified that he instructed Matta to give priority to the case.

1990. By contrast, a TRO was not sought in the Ehrman case until June of 1990, although the necessity for one was made apparent in July of 1989, in Barnes' Action Memorandum.

Witnesses from the clerical staff testified that in reviewing Martinez's work it was poor at best. Testimony revealed that sentences were poorly constructed and contained misspelled words. According to the staff, the papers prepared in the ALIC case were prepared primarily by Matta, not Martinez. It was after the ALIC case was completed that Matta turned his attention back to the Ehrman case.

When the Ehrman investigation became public, Matta accused Barnes of lying, falsifying documents, not sending out the proper questionnaire and conspiring with the Regional Administrator, Browne, to discredit him as an attorney. This accusation came about because a copy of Barnes' Memorandum had found its way to Browne. When Barnes challenged her June 1990 evaluation, Browne's review of Barnes' Memorandum was favorable. This event antagonized Matta.[4] Matta's, Browne's and Boddie's explanations in these areas is found incredible and refuted by other testimonial and documentary evidence.

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[4] It is undisputed and common knowledge that Matta's approval was required on all communication that left the HBO. In the instances that Matta critiqued Barnes' work it was either direct or through Boddie and, according to the evidence, did not result in any material substantive changes as evidenced by a comparison of the plaintiff's exhibits 39 and 40.

The SEC's Knowledge of Work Environment:

During her second year, Barnes served as Federal Women's Program Coordinator, a position previously occupied by Boddie. She was approached by several of the women in the office concerning matters that she felt were serious. These complaints involved the working conditions of the secretaries, favoritism and sexual harassment by senior officials in the HBO and FWRO offices. When these matters were brought to Boddie's and Matta's attention, Barnes was met with yelling threats that she could lose her job. Matta was condescending.

In June of 1990, Barnes met and discussed with Browne the difficulties that she had and that others had confided in her about Matta. The race issue and sexual harassment concerns that Barnes and others had were disclosed to Browne.

Specifically, Barnes and several female employees complained that Matta had gotten them in a one-on-one situation in his office or other isolated places and engaged in sexual and vulgar acts. According to testimony, Matta attempted to embrace Barnes on one occasion and on another opened Coral Ramirez's jacket attempting to expose her breast. Either in his office or that of the female staff, Matta would sit back in his chair and open and close his legs back and forth in a rapid fashion while looking down toward his crotch. Barnes, Monical and Ramirez all related having experienced this conduct.

Matta described his back and forth leg action as a "twitch" of his leg or knee caused by nervousness or

stress. He denies that it ever happened in Monical's presence. He denied opening Ramirez's jacket and insisting on having lunch with her. He also denied making throaty groaning noise, designed to attract Ramirez's attention. The Court finds Matta's explanation wanting in truth. Such nervousness was never displayed during the many days of trial.

Other offensive acts were also related during trial testimony. Ramirez related sexually offensive conduct on the part of Edwin Tomko when he was Branch Chief of the HBO. Tomko had joked, in her presence, that Boddie had been interviewed at a hotel by Wayne Secord. She observed Tomko place his hand on Boddie's thigh on one occasion and Secord kiss Boddie on another. During this time Matta was a staff attorney. Ramirez had confided in Barnes, Boddie, Monical and Sloan. Only Barnes attempted to help Ramirez by relating Matta's conduct to Browne of the FWRO and Miller in the EEO office. Miller simply told Ramirez to get her brother to beat up on Matta. Broddie and other female attorneys told Ramirez to learn to go along and get along.

Ramirez's complaint and Matta's conduct were not recent revelations to the SEC. Four years earlier, in 1986, Ramirez had reported Matta's sexual harassment to Browne, the Regional Administrator. Browne slammed the door on Ramirez's complaint by letter and she was not heard from again until Barnes took her concerns seriously in 1989.[5] Browne's conduct in this regard was incredible.

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[5] In the letter Browne relates:

"There is little probative evidence supporting Ms. Ramirez's allegations, all of which Mr. Matta denies. Assuming that both Mr. Matta and Ms. Ramirez are telling the truth as each

When Matta learned of the Barnes-Browne meeting, matters got worse for Barnes. The alleged lack of trust in Barnes' work intensified leading Matta to question every proceeding and to attempt to disprove every fact that Barnes stated in her Memorandum. For example, certifications from the Texas Railroad Commission were obtained by Barnes stating that Ehrman's companies had not drilled and were not operating any oil and gas wells in Texas.[6] This official document was not sufficient for Matta. He challenged Barnes and then commenced a letter campaign to the Railroad Commission demanding that they provide him with a letter that would accord with his personal standards, i.e. that the Railroad Commission was personally assuring him that Ehrman had no wells operating. This failed, of course, and Matta eventually accepted the certifications.

Finally, in May of 1990, Matta spent four (4) weeks reviewing the Enforcement Memorandum in preparation for final court documents. This final review by Matta came almost two (2) months after Boddie told him (March 1990) that the case was ready for filing. Nevertheless, it was not filed because, according to Matta, other investigations were needed. Ironically, Matta testified that he maintained confidence in Barnes' ability and, therefore, kept her on the case.

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sees it, Ms. Ramirez is deluding herself, perceiving sexual harassment by Mr. Matta where none exists. . . . " (Plaintiff's Ex. 60).

[6] Ehrman had sold stock in his company(s) on the pretense that he was drilling oil and/or gas wells. In fact, he was not drilling or operating any wells.

Other Evidence of Sexual Misconduct:

During the trial, Anna Withers also described a sexual relationship between herself and an unnamed male employer out of the FWRO that occurred in 1986. The encounter as related by Withers to Barnes, Credit, Williams, Robinson and other females as an unpleasant one where she had been forced to engage in non-consensual sex. She testified at trial, however, that the sex was consensual and related that Barnes and others were mistaken in their conclusions. Independently of Barnes, Monical related that the same incident had been related to her by Withers.

Monical also corroborated the fact that much of the male conversation around the office was sexually oriented and suggestive about the females in the office and those visiting the office. She testified that Matta had engaged in the same conduct with her as he had with Barnes and Ramirez. She related that Tomko, then Branch Chief, threatened to fire her if she did not accommodate his sexual desires. According to Monical, Tomko also set up a dinner for herself, Tomko and Secord knowing that he, Tomko, would not show up and that Secord was expecting sexual favors. While waiting for Tomko, Secord suggested to Monical that there was a motel down the street where they could continue their discussions.

Matta categorically denied the charges made by Barnes, Monical and Ramirez. He denies unnecessarily removing staff and attorneys from the Ehrman case and placing them on the ALIC case. He admits that he told the

staff that the ALIC case was to be given priority.[7] He testified that Barnes failed to follow his and Boddie's instructions and denied sending a copy of Barnes' Memorandum to Browne in the FWRO for critical review.[8] He testified that Barnes had overstated or misstated the facts in the Ehrman case, failed to get clear answers in the discovery request, was too argumentative, and stayed on the telephone too much. Thus, her poor performance created her lower rating the 1990.

Matta admits that he went to Martinez after Martinez received an "Outstanding" rating in 1990 and discussed giving Martinez a promotion to pay grade GS14. He admits that he did not make this effort with Barnes or ever notify her that the pay grade was available.[9] In fact, he does not recall telling Barnes what she should do to get promoted. According to Matta, it was Browne's idea

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[7] The record shows that the SEC was anxious to beat the Louisiana Attorney General into Court on this matter. In Matta's and Martinez's haste, they filed the suit in the wrong District in Louisiana causing a venue problem.

[8] The record shows that Matta did in fact send the Memorandum to Browne and commented to Browne favorably about it. This all occurred before Ramirez interviewed and came to work for the HBO.

[9] The reason given by Joseph C. Matta for not hiring the plaintiff at pay grade GS13, Step 3, was that she would have no eligibility for future promotions. This is untrue and a pretext to discriminate against the plaintiff in the terms and conditions of her employment on the basis of her race and/or gender. Virtually all of the employment decisions made by Matta during the plaintiff's employment at the SEC were approved or ratified by the Regional Administrator, T. Christopher Browne and there was never an indication that he would not get whatever he requested from Browne.

to promote Martinez. According to Browne, he only approved Matta's recommendation after Matta prepared all of the paperwork including Browne's memo to the Acting Director of Personnel seeking Martinez's promotion. (See Pl. Exh. #25).

II. CONTENTIONS OF THE PARTIES

Plaintiff's Contentions:

The plaintiff contends that during her employment with the SEC, she experienced discrimination in the terms and conditions of her employment and that she was the victim of race and sex discrimination by the SEC. She contends that she was hired at a lower rate of pay grade (GS13-1) than a male attorney (who was hired at pay grade GS13-3), that she was denied a promotion from pay grade GS13-4 to pay grade GS14-1 as a result of this discrimination, that she was subjected to terms and conditions of employment that were intentionally discriminatory, and that she was sexually harassed by the Assistant Regional Administrator, Jopseph C. Matta, who was in charge of the HBO. Further, the plaintiff contends that when she refused Matta's sexual advances and when she protested his racially and sexually discriminatory behavior to other officials in the SEC, the agency as well as Matta retaliated against her with unwarranted criticism, work showdown, rude, insulting and offensive behavior, work sabotage and a scheme to discredit her, which created a hostile work environment and caused her discharge.

She also contends that as a result of the discriminatory conduct of the defendant, she suffered monetary

losses when she was forced to work at a lower wage than a male attorney with less experience but performing similar duties as the plaintiff, and when she was denied a promotion to pay grade GS14.[10] Further, she contends that such disparity in pay was not based upon good faith conduct or reasonable grounds for believing that such would not violate the Equal Pay Act. She contends that such disparity in pay was hidden from her until May of 1991.

As well, the plaintiff alleges loss of contributions to retirement benefits that were commensurate with the pay of which she was wrongfully denied. She contends that she suffered intangible injuries, physical illnesses, stress reactions, embarrassment, humiliation and mental anguish as a result of the SEC's discriminatory conduct. (See Pl. Exh. #51).

The plaintiff also contends that she is entitled to an award of attorneys' fees for legal representation at the administrative level and for the prosecution of this suit.

In response to the SEC's claims that the 1991 Civil Rights Act does not apply to this case, the plaintiff contends that under controlling Supreme Court precedent, the 1991 Civil Rights Act applies to this case because her

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[10] The plaintiff became eligible for a promotion to pay grade GS14 on October 1, 1989. Matta failed to apprise the plaintiff of the fact that the rules governing eligibility for promotion to this pay grade had changed effective October 1, 1989. Instead, he withheld this information and created conditions that insured that the plaintiff would not be considered for the promotion.

administrative claim was pending on the effective date of the 1991 Act.

Defendants' Contentions:

As a threshold matter, the SEC contends that this Court lacks subject matter jurisdiction over the plaintiff's Title VII claims and common law claims against the United States. With respect to the plaintiff's Title VII claims, the SEC denies that it intentionally discriminated against or harassed the plaintiff either on the basis of her race or sex. As well, it disputes that it retaliated against her or constructively discharged her. The SEC further denies that it illegally paid the plaintiff less than a male attorney on the basis of gender for work requiring equal skills effort and responsibility and which was performed under similar working conditions.

Further, the SEC contends that the plaintiff's demand for injunctive relief must be stricken because the plaintiff is no longer an employee of the SEC and does not seek reinstatement. Moreover, the SEC office in which the plaintiff worked is now closed, and her former supervisor is no longer serving the SEC in a supervisory capacity. Thus, there is no injunctive relief which this Court could order against Joseph C. Matta or against the SEC that would enjoin any future potential irreparable harm to the plaintiff.

With respect to the plaintiff's demand for relief, the SEC contends that the Court should strike her request for compensatory damages because the controlling precedent of this Circuit holds that the Civil Rights Act of 1991 ("1991 Act") is not retroactive, thus, the 1991 Act's

remedies are not applicable to her. In any event, the SEC claims that this Court should strike the plaintiff's demand for punitive damages as those damages are not permitted under the Title VII, the Equal Pay Act, or the Federal Tort Claims Act against the United States or any agency of the federal government.

Discussion:

At the outset, the Court must address two procedural limitations issues raised by the SEC that the plaintiff's suit should be dismissed for lack of jurisdiction. First the SEC charges that the plaintiff failed to bring the offending conduct to the attention of an EEO counselor within 30 days. Next, assuming that it is incorrect on the first claim, the SEC argues that the plaintiff failed to exhaust the administrative remedy available to her and did not timely bring suit. As a final defense, the SEC asserts that the Civil Rights Act of 1991 is inapplicable. These claims will be addressed in turn.

The authorities in this Circuit support the view that any claim of untimeliness in filing a charge of discrimination with the SEC may be waived. *Zipes v. TransWorld Airlines, Inc.*, 455 U.S. 385 (1982); *Munoz v. Aldridge*, 894 F.2d 1489 (5th Cir. 1990). In *Munoz*, the Air Force set out to and did an extensive administrative investigation concerning the charges made by the complainant. Later, the Air Force asserted untimeliness as a defense to the *Munoz's* claims. The Court refused to enforce this limitation holding that the time limits for giving notice or filing an administrative complaint are subject to equitable tolling. *Id.* at 1494.

Here, the SEC conducted an extensive investigation, which included the taking of numerous depositions by and of SEC personnel, that was not completed until December of 1991. As in *Munoz*, the 30-day limitation set by regulations for bringing discriminatory conduct to the attention of an EEO counselor cannot be enforced because the conditions that existed at the HBO were of a continuing nature. Moreover, the Regional Administrator knew about the complaints because the complaints had been repeated by the plaintiff and Ramirez in private meetings with him.[11] There is no doubt that the SEC was fully aware of the work environment at the HBO, enough so to place the SEC on notice of what the plaintiff's claims were. *See Brown v. Marsh*, 777 F.2d 8, 14 (D.C. Cir. 1985).

The Court also holds that the plaintiff sufficiently exhausted the administrative procedures available to her. The SEC's complaint centers on the argument that the plaintiff refused to give her deposition after agreeing to do so.

The record shows that the SEC had essentially completed its investigation but wanted Barnes' deposition. The last agreement setting the deposition was cancelled due to Barnes' illness. The fact that the SEC wanted to close its investigation with Barnes' deposition and was unable to get the deposition within the SEC's timeframe is no reflection on Barnes' cooperation. The SEC's record is replete with evidence of wrongdoing. Moreover, the

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[11] Barnes' word alone would never be enough to convince Browne or the EEO office that Matta was engaged in sexual harassment because his conduct was always displayed in private (See footnote 4 *supra*).

"take-it or leave-it" approach by the SEC had nothing to do with Barnes' effort to provide all of the information that she had.[12]

The Court holds that the plaintiff acted in good faith, even though with a healthy degree of skepticism, concerning the process, and made reasonable efforts to provide the necessary relevant information to the SEC. *Wade v. Secretary of the Army*, 796 F.2d 1369 (11th Cir. 1986). Unfortunately, the SEC rejected the message and the messenger.

Next, the Court turns to the question of whether the Civil Rights Act of 1991 is applicable to the plaintiff's case. The SEC correctly states the law of the Circuit, that § 102 of the 1991 Act is not to be applied retroactively. *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592 (5th Cir. 1992). Thus, the salient question is when did the act or acts giving rise to the plaintiff's claims occur, and does the fact that they were continuing with respect to the hostile work environment and pay differential make a difference.

The undisputed facts support the conclusion that if the plaintiff were discriminated against prior to 1991,

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[12] Prior to setting Barnes' deposition, the SEC issued a press release on December 30, 1991 stating that it had completed its investigation and that there was "absolutely no evidence that Mr. Matta engaged in any of the sexual offenses that were alleged." (Pl. Exh. #62). On February 20, 1992, the SEC cancelled the plaintiff's complaint of race and sex discrimination and forwarded a copy to both the plaintiff and her attorney. Assuming that the letter was received on February 20, a pleading filed on March 23 would be timely. *See* FRCP 6(a).

with regard to salary adjustments and promotions and hostile work environment, the situation continued until her separation from the SEC in September 1991. It appears that even though the racial discrimination commenced in October of 1989 it ceased, as to the plaintiff upon her separation in 1991.

In the case at bar, the conduct that the plaintiff sues about commenced in October of 1989 and continued until her separation from the SEC in 1991. Therefore, the Court holds that the conduct complained about, although occurring in 1991, ceased as to the plaintiff before the effective date of the Civil Rights Act of 1991. The Court turns now to the substantive issues.

The Substantive Issues:

Unwelcomed sexual advances that create an offensive or hostile work environment violates Title VII. *Meritor Sav. Bank v. Vinson,* 477 U.S. 57 (1986). As well, Title VII prohibits discrimination in the terms and conditions of employment based on the sex or gender of an employee. *Id.* at 63. For sexual harassment to be actionable, it must be sufficiently severe or pervasive as "to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67 (*citing Henson v. City of Dundee,* 682 F.2d 897, 904 (11th Cir. 1982)).

Sexual harassment generally falls into one of two categories: "*quid pro quo*" where sexual favors are sought in exchange for a promotion or other advancement or compensation and "hostile environment" where the

workplace is permeated with discriminatory intimidation, ridicule, and insults that severely alters the condition of the victim's employment. *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370 (1993). The latter often results from rejection by the victim and a clear statement that the harasser's conduct will not be tolerated.

Of further importance is the determination of whether the offensive and illegal conduct is meted out by a co-worker or a supervisor. In the latter, where the harasser is a supervisor, the case law and regulations require the victim to prove that the supervisor's conduct falls within the scope of the supervisor's employment, or that the harassing actions were foreseeable. *See Kaufman v. Allied Signal, Inc., Autolite Div., see also* 29 C.F.R. § 1604.11(e).

In the case at bar, the SEC stipulates that Matta was engaged in the course and scope of his employment at the relevant periods of time associated with the plaintiff's claims. Thus, it was Matta's job as Assistant Regional Administrator of the HBO to meet with, supervise and direct the conduct and work product of each of the employers of the HBO. Therefore, the Court concludes that the actions of Matta were associated with the duties of his employment.

But, it is equally compelling that Matta's conduct was foreseeable by Browne although foreseeability need not be proved by the plaintiff. He had, as well as other supervising male employees, engaged in illegal conduct for years. The facts show that the HBO supervisor's conduct, as well as that of several men in the FWRO, created an environment where the female either submitted or was

ridiculed. Specifically, the conduct of Edwin J. Tomko and T. Christopher Browne, both administrators at the FWRO, either by omission or commission engaged in sexually harassing the plaintiff and other female staff. Efforts to bring the female staff's concerns to the FWRO and the Office of General Counsel were met with ridicule and lackluster concern. For example, the EEO Counselor was told of Matta's retaliatory conduct toward Barnes, yet no formal complaint was accepted. Nor are there any documents establishing efforts to investigate the complaint.

The foreseeability aspect of Matta's conduct is also proved by the fact that his supervisor, Browne, knew of the charged conduct starting with Ramirez in 1986. He took no meaningful action to implement appropriate corrective action. *See Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 621 (6th Cir. 1986) *cert. denied*, 481 U.S. 1041 (1987).[13] Title VII affords an employee the right to work in an environment free from discriminatory intimidation, ridicule and insult. *See Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). Browne not only failed, he aided and abetted the illegal conduct.

The plaintiff's testimony, as well as that of corroborating witnesses, also establishes the pervasive nature of Matta's conduct. Clearly, his malicious conduct created and perpetuated a hostile working environment, primarily because he could not have his way with the female

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[13] A plaintiff prevails if she can show that her employer, through its agent or supervisory personnel, knew or should have known of the charged sexual harassment and failed to implement prompt corrective measures. *Id.* at 621.

staff. Without doubt, the females in the HBO were terrified that the conduct of the men, especially Matta, if exposed, might cost them their jobs. Boddie refused to assist Ramirez, although it was her job to do so, when Ramirez sought protection and advice concerning Matta's conduct in 1986. Ramirez was left to fend for herself. It was Barnes, who took on Matta and Browne only to be rebuffed and further harassed. These several men in the HBO and the FWRO used their power and positions to intimidate to the point of forcing several female employees to engage in sexual activities that the females felt compelled to engage in in order to save their careers. These "official despots" create a hostile working environment affecting the plaintiff's and others ability to perform their jobs. *See Waltman v. International Paper Company*, 875 F.2d 468 (5th Cir. 1989).

Matta's conduct was also racially motivated. The record shows that Matta succeeded Michael Rodriguez as Branch Chief in 1986, when Rodriguez became the Assistant Regional Administrator. In 1987, when Matta became the Assistant Regional Administrator, Joy Boddie, a black female, became the Branch Chief. The evidence shows that the compromise by Matta, necessary to secure his own position, did not please him and he immediately set out to discredit Boddie. It was commonly known among the female staff that Matta had little or no respect for Boddie or her work product. He openly expressed his displeasure with her as Branch Chief and undermined her leadership. The facts show and one may reasonably conclude that she was so intimidated by Matta's ridicule and insults, that she refused to give legal advise or comfort to the female staff that sought her guidance. When

Matta learned of Boddie's desire to transfer to Chicago, he set out to employ an Hispanic male.

In October of 1989, after giving glowing reviews to the plaintiff's work product and rating her "Outstanding" on the performance rating, Matta turned foul on the plaintiff. Adrian R. Martinez, who had been reprimanded by the State Bar of Texas, had no verifiable income upon which a starting salary could be based, and had never tried a major case, civil or criminal, was started at a salary equal to that earned by the plaintiff, although she had been with the SEC over a year.[14] The evidence shows, and if Matta and the SEC had checked they could have learned that Martinez had made serious misrepresentations on his application. These misrepresentations went beyond negligence and were in fact intentional in nature, specifically designed to effectuate a given salary for Martinez.

At the time Martinez was considered for employment, the plaintiff was, according to Matta, an excellent employee. In less than three (3) weeks, the plaintiff's rating went from excellent to incompetent. Matta's subsequent favoritism toward Martinez was unyielding. Martinez was recommended for and received a $750 cash

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[14] The plaintiff had significant litigation experience as an Assistant Attorney General for the state of Texas, in the Houston office prior to her employment with the SEC. Thus, her trial and investigative experience prior to her employment by the SEC was equal to, or greater than, the trial and investigative experience of Jean Spradling Hughes, a Caucasian female who was employed one year prior to the plaintiff's employment at page grade GS13-6 at $46,086.00.

award nine months later for his work on the ALIC case.[15] He was permitted a "lit" release (press release) on the case and also received an increase to GS13-4 three (3 months after the plaintiff received the increase. On February 12, 1991, 15 months after being employed, Martinez was promoted ahead of the plaintiff to grade GS15, a grade that the plaintiff had been told was not available to her.

It was during this same period of time that Matta intimidated the plaintiff and mocked her work. After the plaintiff brought these matters concerning pay and sexual harassment to the attention of Matta's superior, Browne, Matta's inappropriate conduct intensified. By way of example, Matta would yell at the plaintiff, threaten to fire her, accused her of lying and creating false documents and conspiring with Browne to discredit him. On occasion when he would pass the plaintiff in the hallway, Matta would give the plaintiff a mean and scurrilous gaze while clinching his fists.

To further intimidate the plaintiff, Martinez was permitted to sit in and participate in Matta's critique of the plaintiff's work. Yet, neither the plaintiff nor Boddie sat in with Matta to critique Martinez's work. On one occasion, Matta and Martinez sat in when the plaintiff interviewed Ehrman. During the interview Matta and Martinez pushed away from the conference table and began laughing behind Barnes' back. Ehrman became so upset and offended that he walked out of the meeting

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[15] Clerical staff testified that Matta actually did all of the work but simply gave the credit for the work to Martinez. The records supports this testimony.

thinking that the conduct of the two was an indication that he, Ehrman, was being "set-up," for criminal charges. Clearly, the business of the SEC is more important than Matta's to frustrate one female.

The reasonable inferences and conclusions to be reached from this conduct is that Matta sought to position Martinez to replace Boddie as Branch Chief of the HBO. Matta knew of Boddie's desire to transfer to the Chicago office. Boddie did, in fact, transfer in August of 1990, only to be replaced by Nancy McGinley. Matta was prepared to and performed every trick to undermine Barnes, who was on track to be considered for any promotion ahead of Martinez. After all, she had more trial and courtroom experience than Matta and Boddie and Martinez together.

According to Ruby Credit, Matta did not deny his prejudice against the plaintiff. Credit testified that Matta would sit on the plaintiff's work indefinitely and then complain to Credit that Barnes was not fast enough. She testified that Matta would pull the clerical staff off Barnes work even when no emergency existed, so that others' work could be done. Subpoenas prepared by Credit, that were passed to Matta, never went out. Matta's reply to Credit about his conduct toward Barnes was that he had connections and nothing was going to happen to him.

The Court is of the opinion and holds that Matta's conduct represented a pattern and practice of discrimination against the plaintiff based on both her gender and race. Although it commenced in October of 1989, it continued to the date of her exit in September of 1991. These racial and gender violations created a hostile working

environment that affected the plaintiff's ability to perform her work. *See Waltman v. International Paper Company,* 875 F.2d 468 (5th Cir. 1989). *See also Harris v. Forklift Systems, Inc.,* 114 S.Ct. 367, 370 (1993).

Moveover, there is no doubt that Matta's supervisor knew of his conduct as early as 1986. Browne chose to duck the issue by telling the victim to try and get along with Matta. When the problems persisted and the total work environment became unconscionably turbulent in 1989 and 1990, Browne failed to implement any strategy beyond the "now, now, big fellow" attitude toward Matta's illegal conduct. Corrective action was required, yet none was taken. *See Kaufman v. Allied Signal, Autolite Division,* 970 F.2d 178 (6th Cir.) *cert. denied,* ___ U.S. ___, 113 S.Ct. 831 (1992).

The Court is also of the opinion that the plaintiff experienced emotional distress that manifested itself in sleeplessness, depression, nervousness and physical symptoms such as digestive disorder, headaches, rashes and swelling. The emotional distress and physical symptoms that the plaintiff experienced were directly caused by the discriminatory conduct directed toward her by Matta and permitted by Matta's supervisors. These findings are supported by Dr. Bell's findings and conclusions that stand unchallenged in the record. (See Pl. Eh. #51).

The plaintiff incurred medical expenses for treatment of the physical symptoms that she suffered from the hostile and discriminatory work environment at the SEC. The plaintiff should be compensated for the psychological damages and expenses that she suffered at the hands of the SEC.

The plaintiff's experience and prior salary with the state of Texas permitted the plaintiff to commence employment at pay grade GS13-3, but for the racial and gender prejudice practiced by Matta.

Finally, the Court holds that the plaintiff was constructively discharged from her employment. The conduct of Matta, McGinley, Browne and Webster created such a hostile atmosphere that Barnes and others could no longer tolerate the working conditions at the HBO.

Conclusion:

The Court finds and holds that the plaintiff's right to work in an environment free from sexual harassment, gender bias and racial discrimination was violated. The discriminatory intimidation, ridicule and insults, meted out by Matta directly and through the supervisors that answered to him, were of such severity that it pervaded the entire work force and altered the conditions of employment of the plaintiff and others, resulting in an intolerable work environment, in violation of Title VII.

The Court, therefore, shall award damages in accordance with Title VII for sex and race discrimination, the Equal Pay Act, a reasonable attorneys fee, and costs of court.

It is so ORDERED.

Signed this 25th day of January, 1996.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WANDERLON ANN BARNES, Plaintiff, VS. RICHARD C. BREEDEN, ET AL., Defendants.	§ § § § § § § §	CIVIL ACTION NO. H-92-0898 (Entered Jan. 29, 1996)

FINAL JUDGMENT

Pursuant to the Amended Memorandum Opinion and Memorandum and Order and incorporating the injunctive relief previously entered against the SEC in *Broderick v. Ruder,* 685 F.Supp. 1269 (D.D.C. (1988), the Court enters an award to the plaintiff as follows:

1) actual damages Title VII and Equal Pay $275,426 plus pre-judgment interest from August 5, 1988 to the date of judgment. (*See Williams v. Trans World Airlines, Inc.*, 600 F.2d 1267, 1274 (8th Cir. 1981);

2) Equal Pay penalty award based on outrageous and intentional conduct $210,468;

3) an attorney fees award of $283,856.25 representing a reasonable fee for the 1,436.75 hours expended in the administrative and

trial proceedings; and representing approximately 1/3 of the damage award. (*See Farrar v. Hobby,* 113 S.Ct. 566, 575 (1992);

4) Post judgment interest at the rate of 5.16% per annum; and

5) All costs of court and separate expenses of $2,721.32.

This is a **FINAL JUDGMENT.**

Signed this 25th day of January, 1996.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20597

WANDERLON ANN BARNES

Plaintiff – Appellee

v.

ARTHUR LEVITT, JR, in his official capacity as Chairman of the United States Securities & Exchange Commission, ET AL

Defendants

ARTHUR LEVITT, JR, in his official capacity as chairman of the United States Securities & Exchange Commission

Defendant – Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Nov. 19, 1997)

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by appellee's in the above case is denied.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge

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CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.